



Katula & another (Suing as legal representatives and administrators of the Estate of Stephen Katula Muyendi) v Musambayi (Being sued on his own behalf and on behalf of 41 others) (Environment & Land Case 209 of 2017) [2023] KEELC 16786 (KLR) (12 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16786 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 209 OF 2017
CA OCHIENG, J
APRIL 12, 2023

BETWEEN

PIDDAN MUSAU KATULA 1ST PLAINTIFF

CHRISTINE MUTILE MWANGI 2ND PLAINTIFF

**SUING AS LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE
ESTATE OF STEPHEN KATULA MUYENDI**

AND

**SILAS KHAEMBA MUSAMBAYI (BEING SUED ON HIS OWN BEHALF AND
ON BEHALF OF 41 OTHERS) DEFENDANT**

RULING

1. What is before Court for determination is the Defendants' Notice of Motion Application dated the 15th February, 2023 brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act* as well as Order 22 and 51 of the *Civil Procedure Rules*. The Defendants seek for the following Orders:
 1. Spent.
 2. Spent
 3. That pending hearing and determination of the Appeal, the Honourable Court do issue a stay of Judgment and Decree issued on 31st October, 2022.
 4. That costs do abide the Application.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Silas Musambayi Khaemba where he deposes that Judgment was made against them on 31st October, 2022 and they are likely to be evicted by 27th February, 2023. He claims they have heavily invested on the



suit land and equally spent a lot to purchase it. He avers that they stand to lose heavily, immensely and irreparably unless a stay order is issued. He states that efforts to negotiate the matter are yet to bear fruits and they are running out of time. Further, that they have preferred an Appeal which is meritorious and if the stay is denied, it will be rendered nugatory as they will be evicted. He reiterates that they have a right to Appeal and the hierarchy of the courts should be respected.

3. The Respondents though duly served failed to file a Replying Affidavit on time to oppose the instant Application.
4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the Notice of Motion Application dated the 15th February, 2023 including the Supporting Affidavit, annexures and rivalling submissions, the only issue for determination is whether the Court should grant a stay of execution of the Judgment and Decree dated the 31st October, 2022, pending the determination of the Appeal.
6. The Applicants in their submissions contend that the instant Application is unopposed. They reiterate that they stand to suffer substantial loss as they have been in occupation of the suit land, established their homes thereon as evident in the photographs they have annexed to the Supporting Affidavit. They have relied on Order 42 Rule 6(1) and (2) of the Civil Procedure Rules as well as the following decisions: *Vishram Ravji v Thornton & Turpin* (1990) KLR 365 and *Kenya Shell Ltd v Kabiru & Anor* (1986) eKLR 410.
7. The Respondents in their submissions insist the Application has been brought under the wrong provisions of the law. Further, that time for filing the Appeal has lapsed. They contend that the Application is devoid of merit. To support their arguments they relied on the following decisions: *RWW v. EKW* (2019) eKLR and *Thomas Kipler Sum v. Philip Kipkorir Samich & 3 others* (2014) eKLR.
8. I will proceed to highlight various legal provisions governing stay pending Appeal.
9. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides that:

No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
10. Further, Rule 5(2) (b) of the *Court of Appeal Rules (Appellate Jurisdiction Act)* provides that:

..... in any civil proceedings, where a Notice of Appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
11. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an issue of stay of execution pending appeal held thus:
 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an Appeal.



2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of Appeal.”
12. See also the decisions of *Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR and *Jaribu Holdings Ltd v Kenya Commercial Bank Ltd.* (CA No. 314 of 2007).
 13. In the current scenario, this Court delivered its Judgment on 31st October, 2022 and allowed the Defendants a period of one hundred and twenty (120) days before they would grant the Plaintiffs vacant possession of the suit land. The Defendants' being dissatisfied with the whole of the said Judgment, lodged a Notice of Appeal on 8th November, 2022. From the averments in the Supporting Affidavit, the Defendants except for filing the Notice of Appeal on 8th November, 2022 has not indicated what directions the Court of Appeal has issued in respect to the Appeal. It is my considered view that since the Defendants already lodged an Appeal in the Court of Appeal, while this Court had granted them a period of one hundred and twenty (120) days before giving vacant possession of the suit land, the instant Application for stay should have been filed in the Court of Appeal. Based on the facts as presented while relying on Rule 5(2) (b) of the *Court of Appeal Rules (Appellate Jurisdiction Act)* cited above and associating myself with the decisions quoted, I find that the Defendants have failed to meet the threshold set for granting stay of execution pending Appeal and will decline to grant the said orders as sought.
 14. It is against the foregoing that I find the Defendants' Notice of Motion Application dated the 15th February, 2023 unmerited and will proceed to dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF APRIL, 2023

CHRISTINE OCHIENG

JUDGE

